

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Del-Met Corp.

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Corporation :  
Franchise Tax under Article 9A of the Tax Law for :  
the Fiscal Year Ended 6/30/77. :

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of October, 1982, he served the within notice of Decision by certified mail upon Del-Met Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

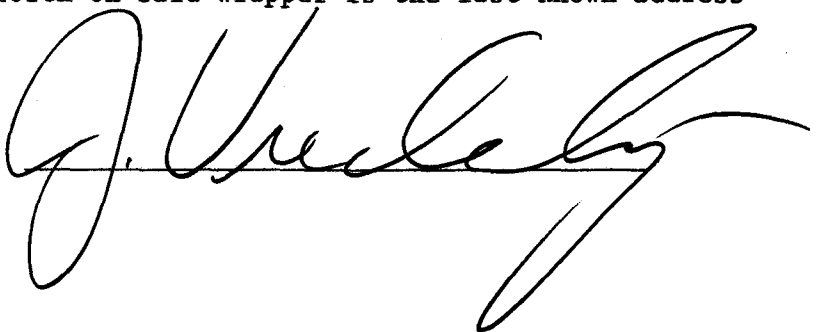
Del-Met Corp.  
44 West St.  
Walton, NY 13856

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
6th day of October, 1982.

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



STATE OF NEW YORK

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for Redetermination of a Deficiency or a Revision :  
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Franchise Tax under Article 9A of the Tax Law for :  
the Fiscal Year Ended 6/30/77. :

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of October, 1982, he served the within notice of Decision by certified mail upon Dominic P. Parlato the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

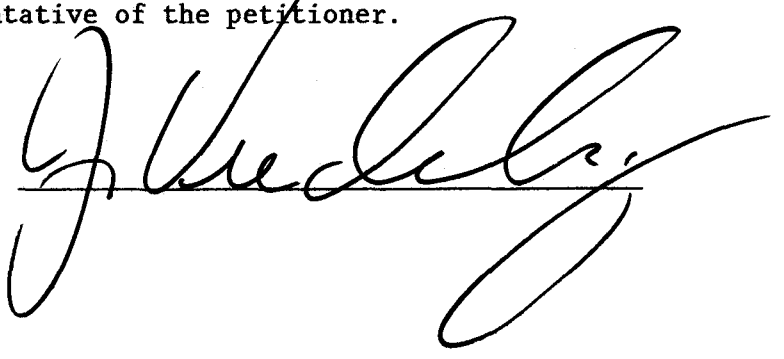
Dominic P. Parlato  
Talevi & Parlato  
37 Dietz St.  
Oneonta, NY 13820

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
6th day of October, 1982.

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

October 6, 1982

Del-Met Corp.  
44 West St.  
Walton, NY 13856

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Dominic P. Parlato  
Talevi & Parlato  
37 Dietz St.  
Oneonta, NY 13820  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
DEL-MET CORP.  
for Redetermination of a Deficiency or for  
Refund of Corporation Franchise Tax under  
Article 9-A of the Tax Law for the Fiscal Year  
Ended June 30, 1977.

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DECISION

Petitioner, Del-Met Corp., 44 West Street, Walton, New York 13856, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal year ended June 30, 1977 (File No. 27295).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, 207 Genesee Street, Utica, New York, on March 15, 1982 at 1:15 P.M. Petitioner appeared by Talevi and Parlato, P.C. (Dominic P. Parlato, C.P.A.). The Audit Division appeared by Paul B. Coburn, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether petitioner had a regular place of business outside New York State during its fiscal year ended June 30, 1977 and could therefore allocate its income under Tax Law section 210.3.

FINDINGS OF FACT

1. Petitioner, Del-Met Corp., allocated 51.5323 percent of its business income to sources outside New York State on its New York State Corporation Franchise Tax Report for the taxable period begun July 1, 1976 and ended June 30, 1977.

2. On January 5, 1979, the Corporation Tax Bureau issued to petitioner a Statement of Audit Adjustment for the fiscal year ended June 30, 1977 showing a net deficiency of \$30,684.90. The deficiency was issued on the basis that petitioner did not have a regular place of business outside New York, and therefore it was not entitled to allocate its income under Tax Law section 210.3.

3. On February 15, 1979, the Tax Compliance Bureau issued to petitioner a Notice of Deficiency for the fiscal year ended June 30, 1977 showing a deficiency of \$30,684.90, plus penalty and/or interest due of \$3,840.92, for a balance due of \$34,525.82.

4. During the period at issue, petitioner, a New York corporation, was in the business of manufacturing and selling automotive accessories, in particular, wheel covers. Except for two salesmen, its approximately 250 employees were employed at its place of business located in Walton, New York.

5. The petitioner employed two salesmen, who were full-time resident employees, in Red Bank, New Jersey and Germantown, Tennessee. According to the testimony of Dominic P. Parlato, petitioner's accountant, the duties of the two salesmen included servicing customers, soliciting new sales, reviewing orders and submitting them to Walton, New York. The petitioner did not rent any office space for use by the two salesmen at these locations. Rather, each salesman operated out of his own home. The telephone listings at their homes were under their own names and not under petitioner's name. Each salesman kept a supply of office supplies and sample inventories and was given a corporate-owned automobile equipped with a mobile phone which was listed under petitioner's name according to Mr. Parlato's testimony, though no documentary proof was introduced to show that the listings were in petitioner's name. Mr. Parlato

also testified that the petitioner prepared industrial reports in Tennessee and business reports in New Jersey.

6. The petitioner hired on commission an independent salesman, who was not an employee, to solicit sales in Europe. He maintained an office in 'S-Graveland, the Netherlands. According to Mr. Parlato's testimony, petitioner's employees had unlimited and unrestricted use of such office when in the Netherlands, and that the maintenance of the office space was considered in establishing the salesman's commission rate.

7. The petitioner filed a California Corporate Franchise Tax Return and paid the minimum tax of \$200.00 for the fiscal year ending June, 1977. However, no income was allocated to California under the California allocation formula.

8. The petitioner operated in Canada through Del-Met Canada, Ltd., a Canadian corporation.

9. The petitioner entered into a manufacturing agreement dated August 4, 1976 with (1) BV Metaalindustrie Caja (hereinafter Caja), a corporation organized and existing under the laws of the Netherlands and having its principal office at Steenbergstraat 25, Kerkrade W., and (2) Del-Met GmbH (hereinafter GmbH), a wholly-owned subsidiary of Del-Met, which was the exclusive distributor of petitioner's products in Western Europe. This agreement provided that Del-Met Corp. "will export...such quantity of Rawlings as Del-Met shall specify on a monthly basis with 15 days' notice to GmbH c/o CAJA and CAJA will chrome plate or otherwise finish the Rawlings in accordance with specifications furnished by Del-Met and assemble, package, warehouse (in space leased to GmbH) and ship the Products, pursuant to instructions from GmbH, and in return will be compensated for the cost of its labor and materials plus a profit as hereinafter provided."

The petitioner also agreed as follows:

1) To advise and assist Caja in the initial installation of equipment and initial production;

2) To provide engineering assistance upon written request by Caja after the initial installation or production "by furnishing the services of one of its personnel who is skilled in the finishing and assembly of the Products (all reasonable and necessary travel and living expenses away from Del-Met's place of business shall be paid for by Caja)";

3) To pay Caja its direct costs plus a profit to finish, assemble and package the Products.

Caja agreed as follows:

1) To ship orders as directed by GmbH and to refrain from any other shipments or sales of the Products;

2) To lease to GmbH space in its plant for a warehouse and office;

3) To provide employees to handle shipping and inventory of the Products whose time spent in this capacity will be reimbursed by Del-Met.

10. That according to the testimony of Dominic P. Parlato, in October, 1976, Del-Met BV, a wholly-owned subsidiary of petitioner, organized and existing under the laws of the Netherlands, purchased some of the assets of GmbH and also became the company to whom petitioner sold Rawlings c/o Caja. Del-Met BV functioned in the capacity described for GmbH in the agreement dated August 4, 1976.

11. Though goods were shipped by petitioner directly to Caja for processing, its invoices show that such goods were sold to Del-Met BV.

12. Caja prepared the billings for goods produced pursuant to the manufacturing agreement and which were shipped from the Caja plant to customers in

Europe. The customer's invoice would indicate a billing from Del-Met BV, not the petitioner. However, Caja sent a monthly bill to petitioner for handling charges for its expenses incurred in preparing customer billings and other shipping documents. Likewise, monthly bills for lease of space were also sent to petitioner. Nevertheless, Del-Met BV and not petitioner paid the bills. Petitioner did pay for insurance coverage for goods and inventory at Caja and was the beneficiary of such coverage.

13. Some equipment used in the processing of goods to petitioner's specifications and located upon the premises of Caja was owned by petitioner.

#### CONCLUSIONS OF LAW

A. That Tax Law section 210.3(a)(4) provides in part:

"(T)hat for taxable years beginning before January first, nineteen hundred seventy-eight, if the taxpayer does not have a regular place of business outside the state other than a statutory office, the business allocation percentage shall be one hundred percent;"

B. That 20 NYCRR 4-2.2(b) as in effect during the period at issue, defined "regular place of business" as follows:

"A regular place of business is any bona fide office (other than a statutory office), factory, warehouse, or other space which is regularly used by the taxpayer in carrying on its business. If, for example, in the regular course of its business, a taxpayer:

(1) stores property in a public warehouse until it is shipped to its customers, the public warehouse is considered a regular place of business; or

(2) delivers raw materials or partially finished goods to an independent contractor to be converted, processed, finished or improved and the converted, processed, finished or improved goods remain in the possession of the independent contractor until shipped to customers, the plant of such independent contractor is considered a regular place of business if the taxpayer retains title to the material or goods."

C. That the burden of proof is upon the petitioner to show that it had a regular place of business outside New York. Tax Law section 1089(e).



D. That petitioner did not have a bona fide office, factory, warehouse or other space outside New York which was regularly used by petitioner in carrying on its business. Therefore, it cannot be concluded that petitioner maintained a regular place of business in New Jersey, Tennessee, California, or the Netherlands. Cf. In the Matter of Babcock Poultry Farms, Inc., State Tax Commission, October 25, 1981, where this Commission held that the petitioner, Babcock Poultry Farms, Inc., had a regular place of business outside New York where a bona fide office was maintained in the Netherlands and was run by an employee of the petitioner, who worked exclusively for the petitioner. In that case, the corporation paid monthly rent for an office which was listed on the corporation's stationery as an office.

E. That the plant of Caja cannot be considered a regular place of business of petitioner. Caja was not an independent contractor hired by petitioner to process its goods since the petitioner sold the goods it shipped to Caja to Del-Met BV and did not retain ownership of such goods.


F. That the petition of Del-Met Corp. is denied and the Notice of Deficiency issued on February 15, 1979 is sustained.

DATED: Albany, New York

OCT 06 1982

STATE TAX COMMISSION

  
~~ACTING~~  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER